

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PAUL CLOER, et al.,

Plaintiffs,

v.

UNITED FOOD & COMMERCIAL  
WORKERS INTERNATIONAL UNION,  
et al.,

Defendants.

CASE NO. C05-1526JLR

ORDER

**I. INTRODUCTION**

This matter comes before the court on a motion for summary judgment from Defendants United Food and Commercial Workers International Union (“UFCW”), Geralyn Luty, and Cynthia Bell (Dkt. # 34). The parties have not requested oral argument. The court has considered the briefing and evidence in support thereof, and for the reasons explained below, GRANTS Defendants’ motion for summary judgment.

**II. BACKGROUND**

This action arises out of Plaintiffs Pamela and Paul Cloers’ employment at UFCW. UFCW has regional offices located throughout the United States and Canada; its

1 employees assist local unions with collective bargaining, organizing, and political efforts.  
2 Paul Cloer is currently a UFCW Representative for Region 7, based in Bellevue,  
3 Washington. Prior to her retirement in January 2005, Ms. Cloer also worked as a Region  
4 7 UFCW Representative. As representatives, Mr. and Ms. Cloer traveled frequently,  
5 primarily working in the field, organizing and assisting local unions. Mr. and Ms. Cloer  
6 married in May 2003.  
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8 The Cloers assert various claims of employment discrimination under 42 U.S.C. §  
9 2000e, *et seq.* (“Title VII”) and the Washington Law Against Discrimination (“WLAD”),  
10 RCW § 49.60.180, 210. Ms. Cloer alleges hostile work environment, constructive  
11 discharge, and retaliation. Mr. Cloer alleges marital status discrimination, hostile work  
12 environment, sex discrimination, and retaliation.<sup>1</sup>  
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14 Many of the Cloers’ claims derive from the allegation that UFCW failed to protect  
15 Ms. Cloer’s personal contact information and work itineraries from a threatening ex-  
16 boyfriend, Bradford Lago. Mr. Lago was never an UFCW employee. Ms. Cloer dated  
17 Mr. Lago from about 1996 until late 1999. Detwiler Decl., Ex. A (Ms. Cloer Dep. at 5)  
18 (R. at 5).<sup>2</sup> When the relationship ended, Mr. Lago allegedly commenced stalking and  
19 harassing Ms. Cloer, which continued for a period of nearly six years. Ms. Cloer Decl.  
20 ¶¶ 6, 14 (Dkt. # 91)<sup>3</sup>. Mr. Lago’s behavior allegedly included making phone calls to Ms.  
21 Cloer and/or leaving messages featuring sexual noises, appearing at Ms. Cloer’s work  
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23 <sup>1</sup>Mr. and Ms. Cloer initially filed two separate complaints against Defendants. The court  
24 consolidated the two cases on December 28, 2005 (Dkt. # 12).

25 <sup>2</sup>Defendants attached a lengthy record to their motion for summary judgment (Dkt. # 34). For  
26 ease of reference, the court includes cites to the page of the record where available.

27 <sup>3</sup>The court cites to the corrected image of the Cloers’ response (Dkt. # 91). The Cloers fail to  
28 number, label, or authenticate many documents attached to their reply. While the relevance of the bulk of  
these documents escapes the court, the court notes that it will not consider unauthenticated documents. See  
Canada v. Blain’s Helicopters, Inc., 831 F.2d 920, 925 (9th Cir. 1987).

1 sites or hotels, and damaging her vehicle while she worked in the field. See Pls.' Resp. at  
2 11-12. Ms. Cloer and Mr. Lago obtained protection orders against each other in 1999.  
3 Mr. Cloer Dep. at 159-187 (R. at 20-23). In December 1999, Mr. Lago began dating and  
4 eventually married another UFCW employee, Wendy Thompson.<sup>4</sup> The Cloers contend  
5 that Ms. Thompson, a secretary at the regional office, leaked the Cloers' personal contact  
6 information to Mr. Lago and that UFCW supervisors condoned this practice. Pls.' Resp.  
7 at 6.  
8

9 The Cloers name two UFCW supervisors in their complaint, Geralyn Luty and  
10 Cynthia Bell. Ms. Luty was the Director of Region 7 from October 1, 2002 through  
11 October 23, 2006. Ms. Luty had day-to-day managerial responsibility for all Region 7  
12 employees. Defendant Cynthia Bell was Ms. Luty's Executive Assistant beginning  
13 March 1, 2003. Ms. Bell assisted in the management of Region 7 field employees,  
14 including Mr. and Ms. Cloer.  
15

16 In February 2003, Ms. Luty learned that Ms. Cloer was not providing UFCW with  
17 her hotel information when she worked in the field. Luty Decl. ¶ 36 (R. at 290-91). Ms.  
18 Cloer explained that she had previously been stalked by Mr. Lago and that she was  
19 concerned that Mr. Lago would obtain her hotel information through his wife, Ms.  
20 Thompson. *Id.* Ms. Cloer did not specify any recent acts of harassment by Mr. Lago. *Id.*  
21 Ms. Luty told Ms. Cloer that she was required to provide an office secretary, Victoria  
22 Hook, with her hotel information while she worked in the field. *Id.*; Ms. Cloer Dep. at  
23 198 (R. at 25). Ms. Luty directed Ms. Hook to keep Ms. Cloer's hotel information  
24 confidential. Luty Decl. ¶ 37 (R. at 291); Hook Decl. ¶ 5 (R. at 520-1). On or about  
25 March 10, 2003, Ms. Luty instructed Ms. Hook and Ms. Thompson that they were not  
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28 <sup>4</sup>Ms. Thompson and Mr. Lago were originally named Defendants in this action. In its order of  
September 27, 2006 (Dkt. # 30), the court granted a motion for judgment on the pleadings from Ms.  
Thompson and Mr. Lago, resulting in the dismissal of all claims against them.

1 permitted to give out any personal information concerning a field employee to an  
2 unauthorized person, and further, that doing so would be grounds for termination. Luty  
3 Decl. ¶ 38 (R. at 291).

4 On May 1, 2003, Mr. and Ms. Cloer were disciplined as a result of an  
5 investigation into a sexual harassment complaint that was made by a coworker in  
6 February 2003. *Id.* ¶¶ 11-13 (R. at 283-84); Perrone Decl. ¶¶ 7-8 (R. at 402).<sup>5</sup> Mr. Cloer  
7 received a notice of unsatisfactory performance and Ms. Cloer received a written  
8 admonishment. Luty Decl. ¶¶ 11-13, Ex. A (Written Admonishment) (R. at 300);  
9 Perrone Decl., Ex. A (Notice of Unsatisfactory Performance) (R. at 404-05). On May 1,  
10 2003, Ms. Luty held a disciplinary meeting with Ms. Cloer and her union representative,  
11 Castro Perez. Luty Decl. ¶ 39 (R. at 291). After receiving the admonishment, Ms. Cloer  
12 informed Ms. Luty that she had a work-related safety concern, but that she preferred Mr.  
13 Perez to discuss it privately with Ms. Luty. *Id.* Once Ms. Cloer left the meeting, Mr.  
14 Perez informed Ms. Luty that Ms. Cloer was receiving hang-up or threatening calls in the  
15 field; Ms. Cloer believed someone at UFCW was leaking her personal contact  
16 information to Mr. Lago. *Id.*

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19 Thereafter, Ms. Luty met with Ms. Cloer and informed her that were an employee  
20 to be leaking such information, that it would be grounds for termination. *Id.* ¶ 40 (R. at  
21 292). When Ms. Luty asked Ms. Cloer for more information to support her accusations,  
22 Ms. Cloer was unable to provide any. Ms. Cloer Dep. at 262-63 (R. at 36-37).

23 Ms. Luty discussed Ms. Cloer's accusation regarding Mr. Lago with Ms.  
24 Thompson, who denied leaking any information to Mr. Lago. Ms. Luty emphasized that  
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28 <sup>5</sup>The coworker apparently complained that Mr. Cloer made disparaging remarks about her because  
she rejected his romantic advances. She also raised a concern that, when Ms. Cloer began dating Mr.  
Cloer, Ms. Cloer began to undermine her work. Neff Decl. ¶ 4 (R. 426).

1 staff information should be kept confidential and that releasing such information would  
2 be grounds for termination. Luty Decl. ¶ 41 (R. at 292); Lago Decl. ¶ 14 (R. at 528).

3 In April 2004, Mr. Cloer was demoted; he had previously been promoted from  
4 Representative to the position of Collective Bargaining Representative in March 2002. In  
5 Mr. Cloer's stead, UFCW promoted Edward Thompson to fill the position. Luty Decl. ¶  
6 35 (R. at 290).

7 In a letter dated May 3, 2004, the Cloers provided Ms. Luty with a new address, a  
8 post office box. Luty Decl. ¶ 45, Ex. C (R. at 293, 309). They requested that UFCW  
9 include the post office box and exclude their home phone number from a field employee  
10 contact sheet due to safety concerns. Id. By letter dated May 11, 2004, Ms. Luty agreed  
11 to list the Cloers' post office box instead of their home address, but denied the Cloers'  
12 request to remove their phone number. Luty Decl. ¶ 48, Ex. D (R. at 294, 310). Ms.  
13 Luty explained that the Region 7 office and local unions required phone numbers to  
14 reach Mr. and Ms. Cloer, who, as field employees, rarely came to the office. Id. Ms.  
15 Luty suggested that they could provide cell phone or pager numbers instead of a home  
16 telephone number. Id. ¶ 49 (R. at 294).

17  
18 In late May 2003, Mr. and Ms. Cloer provided Ms. Luty with copies of petitions  
19 for protection orders that they had recently filed against Mr. Lago in state court. Luty  
20 Decl. ¶ 43, Ex. B (R. at 293, 301-08).

21  
22 In June 2003, UFCW placed Ms. Thompson on administrative and later suspended  
23 her. Id. ¶ 44 (R. at 293). Ms. Thompson allegedly provided Mr. Lago with the phone  
24 number of a UFCW employee from another regional office, whom Mr. Lago apparently  
25 hoped would testify against Mr. Cloer in the protection order proceedings. Luty Decl. ¶  
26 44 (R. at 293). Shortly thereafter, on September 1, 2003, Ms. Thompson retired. Id.  
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1 In a July 28, 2003 letter, Ms. Cloer “share[d] some safety concerns with” then  
2 UFCW President Douglas H. Dority. Ms. Cloer Dep. at 307-08, Ex. 49 (R. at 39-40,  
3 119). Ms. Cloer asked Mr. Dority to enforce UFCW’s anti-harassment policy against Mr.  
4 Lago. Id. In response, Mr. Dority noted that her complaint did not appear to involve  
5 workplace harassment but that UFCW intended to investigate Ms. Cloer’s allegations “to  
6 assure that any potential workplace issues [were] addressed.” Id. at 316, Ex. 50 (R. at 43,  
7 139). In a reply letter to Mr. Dority on September 22, 2003, Ms. Cloer identified Mr.  
8 Lago’s presence at UFCW social functions and calls to hotel and union offices while she  
9 worked in the field as conduct that occurred in the workplace. Id. at 320-21, Ex. 51 (R.  
10 at 44-45, 140-41). She closed the letter with a statement that Ms. Thompson’s recent  
11 retirement. should solve the problem, but that if it did not, she would let Mr. Doherty  
12 know. Id. UFCW completed its investigation into Ms. Cloer’s allegations of workplace  
13 harassment and concluded that they were unfounded. Neff Decl. ¶ 9; Ex. C (R. at 428,  
14 501-13).  
15

16 In a February 11, 2004 meeting with Ms. Luty, Ms. Cloer raised a safety concern  
17 about having to stay at the Ramada Inn while she worked in the field. Luty Decl. ¶ 53  
18 (R. at 296). Ms. Cloer described vandalism to her car occurring at the Ramada Inn,  
19 including a scratch in August or September 2003, and drops of metallic substance on the  
20 door and roof in November 2003. Id. By letter dated February 16, 2004, Ms. Cloer sent  
21 Ms. Luty a request for a “hotel exemption” because she did not feel safe at the Ramada  
22 Inn. Id. ¶ 54 (R. at 296). Ms. Luty explained to Ms. Cloer that UFCW policy was to  
23 require field employees to stay at the same hotel for purposes of accessibility and  
24 communication. Luty Decl. ¶ 53 (R. at 296).  
25

26 In April through June 2004, Mr. and Ms. Cloer complained that they had not  
27 received certain mailings from Region 7. Luty Decl. ¶ 56 (R. at 297). In response, Ms.  
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1 Luty instructed an employee to send Mr. and Ms. Cloer certified mail. When Mr. and  
2 Ms. Cloer complained about the certified mailings as “singling” them out, the UFCW  
3 discontinued the practice. Id., Ex. O (R. at 328).

4 In June 2004, Ms. Luty instituted a region-wide policy requiring that employees  
5 without cell phones call in to headquarters twice per day to check for messages. Luty  
6 Decl. ¶ 52 (R. at 295) The policy applied to all employees who had not provided the  
7 office with cell phone numbers, including Mr. and Ms. Cloer. Id.

8 On July 30, 2004, Ms. Luty and Ms. Bell issued a memorandum to the entire  
9 UFCW staff about employees’ obligation to let a supervisor know if they needed to take  
10 time off due to illness, doctor’s appointments, or other emergencies. Luty Decl. ¶ 58 (R.  
11 at 298). The memorandum was prompted by Ms. Luty’s and Ms. Bell’s discovery that  
12 Ms. Cloer was attending doctor’s appointments for four or more hours during work hours  
13 without notifying her supervisors that she was leaving her field assignments. Id.

14 By letter dated January 9, 2005, Ms. Cloer informed UFCW that she would retire  
15 on January 18, 2005 based on her eligibility for early retirement. Id. at 543-44, Ex. 146  
16 (R. at 95-96, 166).

17 Defendants now move for summary judgment, arguing that the Cloers fail to  
18 produce sufficient evidence to support their employment discrimination claims.

### 21 **III. ANALYSIS**

22 In examining a motion for summary judgment, the court must draw all inferences  
23 from the evidence in the light most favorable to the non-moving party. Addisu v. Fred  
24 Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). Summary judgment is proper where  
25 there is no genuine issue of material fact and the moving party is entitled to judgment as a  
26 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden to  
27 demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477  
28

1 U.S. 317, 323 (1986). If the moving party meets its burden, the opposing party must  
2 show that there is a genuine issue of fact. Matsushita Elect. Indus. Co. v. Zenith Radio  
3 Corp., 475 U.S. 574, 586-87 (1986). The opposing party must present significant and  
4 probative evidence to support its claim or defense. Intel Corp. v. Hartford Accident &  
5 Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991). For purely legal questions, summary  
6 judgment is appropriate without deference to the non-moving party.

7 **A. Timeliness of Claims under Title VII and the WLAD**

8 In materials submitted to the court, the Cloers refer to events occurring some years  
9 ago or even fail to provide the time frame of alleged incidents. E.g., Ms. Cloer Dep. at  
10 321-25 (R. at 45-49) (identifying events in 1999, 2000, 2001); Pls.' Resp. (failing to  
11 provide the year of any alleged incident).<sup>6</sup> At the outset, the court notes that it rests its  
12 analysis exclusively on timely allegations.

13 Under Title VII, a prerequisite to suit is that a plaintiff must pursue an  
14 administrative charge with the EEOC within 300 days of the alleged unlawful employment  
15 action. 42 U.S.C. § 2000e-5(e)(1). Acts falling outside of this statutory time period are  
16 generally untimely. The exception to this rule are acts purported to support a hostile work  
17 environment claim. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115-120  
18 (2002) (reasoning that hostile work environment claims, unlike discrete acts of  
19 discrimination or retaliation, involve repeated conduct by their very nature). Id. Where a  
20 plaintiff alleges a hostile work environment, a court may consider any acts occurring  
21 beyond the statutory limit, provided that an act contributing to the claim occurred within  
22 the filing period. Id. at 117. The Cloers filed charges with the EEOC on December 7,  
23 2004. Ms. Cloer Dep., Ex. 1; Mr. Cloer Dep., Ex. 68 (R. at 97, 205). With the exception  
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28 <sup>6</sup>Where the Cloers fail to provide the court with dates, the court relies on Defendants' unanswered evidence of the timing of an event.

1 of hostile work environment claims, the court will not consider events prior to February  
2 11, 2004 in its analysis of the Cloers' Title VII claims

3 There is no requirement to exhaust administrative remedies before commencing a  
4 suit under the WLAD. There is, however, a three year statute of limitations. Antonius v.  
5 King County, 103 P.3d 729, 732 (Wash. 2004). Mr. and Ms. Cloer filed their complaints  
6 in this matter on September 6, 2005; therefore, conduct occurring prior to September 6,  
7 2002 is generally untimely under state law. Yet, state law parallels federal law in that a  
8 plaintiff may use an incident outside the limitations period to establish hostile work  
9 environment. Id. at 732-37 (adopting the Morgan Court's rationale in finding that acts,  
10 which fall outside of the statute of limitations, are properly considered by the trial court in  
11 its analysis of a hostile work environment claim). Therefore, in analyzing state law  
12 claims, with the exclusion of acts related to hostile work environment, the court does not  
13 consider conduct occurring prior to September 6, 2002.

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15 **B. Ms. Cloer's Hostile Work Environment Claim**

16 Ms. Cloer's hostile work environment claim appears to rest on her contention that  
17 her employer bears responsibility for the release of her personal information and work  
18 itineraries to Mr. Lago, thus facilitating his campaign of harassment.  
19

20 Title VII prohibits an employer from "discriminat[ing] against any individual with  
21 respect to his [or her] compensation, terms, conditions, or privileges of employment  
22 because of . . . sex." 42 U.S.C. § 2000e-2(a)(1).<sup>7</sup> Discrimination on the basis of sex may  
23 take the form of sexual harassment that reveals itself in "[u]nwelcome sexual advances,  
24 requests for sexual favors, and other verbal or physical conduct of a sexual nature."  
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26 <sup>7</sup>For the most part, the Cloers' WLAD claims may be adjudicated along with their Title VII claims,  
27 since "decisions interpreting [Title VII] are persuasive authority for the construction of [WLAD]." Xieng  
28 v. Peoples Nat'l Bank, 844 P.2d 389, 392 (Wash. 1993). The court's references to federal law therefore  
apply with equal force to Mr. and Ms. Cloers' WLAD claims. Where there is a pertinent distinction  
between state and federal laws, the court analyzes the two laws separately.

1 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (quoting EEOC Guidelines, 29  
2 C.F.R. § 1604.11(a)(1985)). Such claims, known as hostile work environment, arise  
3 when “the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult . .  
4 . sufficiently severe or pervasive to . . . create an abusive working environment.” Harris v.  
5 Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Sav. Bank, 477 U.S. at 65, 67).

6 When the alleged harassment is carried out by a non-employee, as Ms. Cloer  
7 alleges, an employer may be liable only where it ratifies or condones the private  
8 individual’s conduct by failing to investigate and remedy it after learning of it. See, e.g.,  
9 Little v. Windermere Relocation, Inc., 301 F.3d 958, 968 (9th Cir. 2002) (holding  
10 employer liable where, by “failing to take immediate and effective corrective action,” it  
11 “ratified” rape of employee by potential client); Folkerson v. Circus Circus Enters., Inc.,  
12 107 F.3d 754, 756 (9th Cir. 1997) (“We now hold that an employer may be held liable for  
13 sexual harassment on the part of a private individual . . . where the employer either ratifies  
14 or acquiesces in the harassment by not taking immediate and/or corrective actions when it  
15 knew or should have known of the conduct.”). Once an employer knows or should have  
16 known about harassment, it is required to “undertake remedial measures reasonably  
17 calculated to end the harassment.” Galdamez v. Potter, 415 F.3d 1015, 1024 (9th Cir.  
18 2005) (internal quotations omitted). In the context of third-party harassment, the  
19 reasonableness of such remedial measures depends on an employer’s ability to stop the  
20 harassment and to deter potential harassers, as well as the promptness of the response. Id.

21 Ms. Cloer fails to allege sufficient facts to hold UFCW liable for the actions of Mr.  
22 Lago, a non-employee. There is no evidence before the court to suggest that UFCW  
23 ratified or condoned Mr. Lago’s conduct. Instead, Defendants’ unanswered evidence  
24 demonstrates that once Ms. Cloer raised her safety concerns with Ms. Luty in February  
25 2003, Ms. Luty took steps to ensure that Ms. Thompson – and likewise Mr. Lago – did  
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1 not have access to Ms. Cloer's information. Ms. Luty ensured that Ms. Cloer's work  
 2 itinerary would be known only to a few UFCW employees, including herself, Ms. Bell,  
 3 and Ms. Hook. Luty Decl. ¶¶ 37-38 (R. at 291). Ms. Luty instructed Ms. Hook that she  
 4 should not share staff information with anyone other than Ms. Luty and Ms. Bell. *Id.*;  
 5 Hook Decl. ¶ 4 (R. at 291, 520-21). Ms. Luty further directed Ms. Thompson not to give  
 6 out any information about employees to outsiders and informed her that failing to abide by  
 7 her instruction would be grounds for termination. Luty Decl. ¶¶ 38, 41; Lago Decl. ¶ 12  
 8 (R. at 291-92, 527-29). When UFCW learned that Ms. Thompson had provided Mr. Lago  
 9 with the contact information of another UFCW employee for his use in the protection  
 10 order proceedings, Ms. Thompson was put on administrative leave, and later suspended.  
 11 Luty Decl. ¶ 44, Lago Decl. ¶¶ 16-17, Ex. D (R. at 294, 527-29, 546-47). Finally, Ms.  
 12 Luty kept Ms. Cloer's travel itineraries off the office bulletin board and allowed Mr. and  
 13 Ms. Cloer to list a post office box on an employee contact sheet instead of listing their  
 14 home address. Luty Decl. ¶¶ 45, 49, Exs. G, H; Hook Decl. ¶¶ 4-6 (R. at 313-16, 520-  
 15 21). On this evidence, no reasonable juror could conclude that Defendants condoned Mr.  
 16 Lago's alleged stalking. In addition, Ms. Luty's actions to protect the confidentiality of  
 17 Ms. Cloer's personal information constituted reasonable corrective measures.<sup>8</sup>

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 20 Washington courts have adopted a slightly different approach to the question of an  
 21 employer's liability for sexual harassment by a non-employee. In DeWater v. State, 921  
 22 P.2d 1059, 1065 (Wash. 1996), the court held that the employer's ability to control the  
 23 actions of a third-party is the key inquiry in determining whether discrimination can be  
 24 imputed to the employer. Ms. Cloer fails to produce evidence to allow a reasonable juror  
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26  
 27 <sup>8</sup>Ms. Cloer contends that Ms. Luty "undid the safety plan" to protect her personal information and  
 28 that Ms. Luty aided Mr. Lago "in his fight against" Ms. Cloer's restraining order by leaking information  
 concerning Ms. Cloer's whereabouts. See Pls.' Resp. at 11. Ms. Cloer's speculation is unsupported by  
 any evidence before the court.

1 to conclude that UFCW had the ability to control Mr. Lago's allegedly intimidating  
 2 behavior. Mr. Lago has never been an employee of UFCW. He is not a member, vendor,  
 3 or otherwise affiliated with UFCW. His sole connection to UFCW is that he dated, and  
 4 then married Ms. Luty's former secretary, Ms. Thompson. On these facts, Ms. Cloer's  
 5 claim is likewise deficient under state law

6 For all of these reasons, the court concludes that Ms. Cloer's allegations are  
 7 insufficient to allow a reasonable juror to find Defendants liable for subjecting her to a  
 8 hostile work environment.<sup>9</sup>

### 9 **C. Ms. Cloer's Claim of Constructive Discharge**

10 Ms. Cloer lists a cornucopia of allegations as bases for her constructive discharge  
 11 claim, none of which amount to discriminatory working conditions. See Detwiler Decl.,  
 12 Ex. C (R. at 266-78) (answers to interrogatories listing 85 reasons as bases for constructive  
 13 discharge claim).

14 To survive summary judgment on a constructive discharge claim, Ms. Cloer must  
 15 show that "there are triable issues of fact as to whether a "reasonable person in [her]  
 16 position would have felt that [she] was forced to quit because of intolerable and  
 17 discriminatory working conditions." Steiner v. Showboat Operating Co., 25 F.3d 1459,  
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 21 <sup>9</sup>Although the court rests its disposition on the law regarding an employer's liability for a private  
 22 person's conduct, it observes that Ms. Cloer's allegations likely fail to support a finding of a hostile work  
 23 environment in the first place. Ms. Cloer's factual contentions include that Mr. Lago showed up at her  
 24 hotel, damaged her company car, and made phone calls to her hotels and local union offices. See Pls.'  
 25 Resp. at 13; Ms. Cloer Dep. at 320-21, Ex. 51 (R. at at 140). Ms. Cloer fails to provide more specific  
 26 details regarding these allegations. Ms. Cloer also identifies UFCW social functions where Mr. Lago was  
 27 present, including Christmas parties, a baseball game in 2001 when he made a "scary face," and a March  
 28 2003 retirement party for a coworker when, with a "hateful" look in his eyes, Mr. Lago moved towards her.  
 Ms. Cloer Dep. at 321-24, Ex. 4 (R. at 45-49, 104-05). These ill-defined incidents fall below the the level  
 of severity or pervasiveness necessary to establish a hostile work environment. Cf. Harris v. Forklift  
 Sys., Inc., 510 U.S. 17, 19-24 (finding evidence that plaintiff was subjected to frequent insults because of  
 gender and sexual innuendo, including repeated suggestion that she should retrieve coins from male  
 supervisor's front pocket and sexual comments about clothing, was sufficient to withstand summary  
 judgment on her hostile work environment claim).

1 1465 (9th Cir. 1994). “[C]onstructive discharge occurs when the working conditions  
2 deteriorate, as a result of discrimination, to the point that they become ‘sufficiently  
3 extraordinary and egregious to overcome the normal motivation of a competent, diligent,  
4 and reasonable employee to remain on the job to earn a livelihood and to serve his or her  
5 employer.’” Brooks v. City of San Mateo, 229 F.3d 917, 930 (9th Cir. 2000) (internal  
6 citations omitted). Consistent with this requirement of the heightened showing of  
7 intolerable working conditions, the Ninth Circuit has held that no constructive discharge  
8 occurs if intolerable and discriminatory working conditions cease some time before the  
9 employee quits her job. See, e.g., Steiner, 25 F.3d at 1465-66 (holding that the plaintiff  
10 failed to establish a claim for constructive discharge where she left her employer two and  
11 one-half months after the discriminatory and harassing conduct had ceased); Montero v.  
12 AGCO Corp., 192 F.3d 856, 861 (9th Cir. 1999) (dismissing plaintiff’s constructive  
13 discharge claim based on her testimony that the employer’s harassing behavior had ceased  
14 three to four months before she quit her job).

16 The court confines its analysis to the working conditions immediately preceding  
17 Ms. Cloer’s retirement in January 2005. The following allegedly intolerable conditions  
18 fell within the last months of Ms. Cloer’s employment: (1) UFCW sent materials by  
19 certified mail; (2) Ms. Bell and Ms. Cloer disagreed about whether Ms. Cloer asked to fly  
20 on a 5:30 flight or a 4:15 flight; (3) Ms. Cloer was required to call in twice a day; (4) Ms.  
21 Bell questioned Ms. Cloer about her massage therapy and accused Ms. Cloer of taking a  
22 two-hour lunch; (6) Ms. Cloer was forced to work longer because she had medical  
23 appointments<sup>10</sup>; (8) Ms. Bell questioned Ms. Cloer about her medical restriction that she  
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27 <sup>10</sup>According to UFCW’s evidence, all field staff employees were expected to work at least eight  
28 hours a day, in addition to travel time from their homes. Luty Decl. ¶ 59 (R. at 298). UFCW apparently  
permitted Ms. Cloer to attend doctor’s appointments during normal work hours but still expected her to  
work an eight-hour day. Id. Ms. Cloer does not assert a disability discrimination claim.

1 only work eight hours a day including driving time; and (8) Ms. Cloer was assigned to  
2 projects outside her home area.<sup>11</sup> *Id.*; Defs.’ Mtn. at 10-12.

3 Most significantly, Ms. Cloer fails to produce any evidence to show that these  
4 alleged working conditions or employment actions fall within the ambit of Title VII or the  
5 WLAD as discrimination that is sex-based in nature. *See* 42 U.S.C. § 2000e-2(a)(1)  
6 (prohibiting discrimination “because of” sex); RCW § 49.60.180 (making it an unfair  
7 practice to discriminate against a person “because of . . . sex”). Without more, no  
8 reasonable juror could find that Ms. Cloer was force to quit because of “discriminatory”  
9 working conditions. *See Steiner*, 25 F.3d at 1465.  
10

11 Moreover, the evidence submitted by the parties reveals that Ms. Cloer’s working  
12 conditions were not so intolerable that a reasonable person in her position would feel  
13 compelled to resign. Ms. Cloer argues that the culmination of years of conduct finally  
14 resulted in the situation becoming intolerable: “[f]or years, [Ms.] Luty and her staff had  
15 been messing with [Ms. Cloer]. Each time she would demonstrate the illegality of their  
16 actions, they would simply slip into another means of getting to her. It is no wonder she  
17 had over eighty reasons for leaving.” Pls.’ Resp. at 17. Ms. Cloer fails to present any  
18 legal authority to establish the viability of a constructive discharge in the absence of  
19 immediate, intolerable working conditions. Instead, Ms. Cloer contends that a reasonable  
20 person in her position would have quit because her medical provider, who had “been  
21 monitoring the effects of her work-related sexual harassment and retaliation for years”  
22 advised her to resign for the sake of her health. *Id.* This line of argument is unavailing.  
23

24 To meet her burden, Ms. Cloer must identify objectively intolerable discriminatory  
25 working conditions. Because Ms. Cloer fails to raise a genuine issue of material fact as to  
26

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27 <sup>11</sup>Such assignments were apparently not a new development in Ms. Cloer’s career. Evidence  
28 produced by UFCW demonstrates that in the years preceding her retirement, Ms. Cloer worked outside of  
her home area over ninety percent of the time. Luty Decl. ¶ 60 (R. at 299).

constructive discharge, the court grants Defendants' motion for summary judgment on this claim.

**D. Mr. Cloer's Claim of Marital Status Discrimination**

While Mr. Cloer's complaint alludes to marital status discrimination<sup>12</sup>, he fails to support the claim with specific evidence, nor does he address it in his response to Defendants' motion for summary judgment. See Paul Cloer Compl. ¶ 10; Pls.' Resp. Mr. Cloer's ill-defined accusation fails to designate "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. Lacking evidentiary support, Mr. Cloer's marital discrimination claim does not survive summary judgment.

**E. Mr. Cloer's Claim of Hostile Work Environment**

Mr. Cloer alleges a seemingly derivative claim for the alleged sexual harassment of his wife. See Paul Cloer Compl. ¶ 10 (alleging "[c]reating and tolerating a hostile work environment against the male plaintiff by allowing the spouse of one of its employees to sexually harass his spouse"). As with the claim above, Mr. Cloer makes no attempt to support this claim in his response to Defendants' motion for summary judgment. See Pls.' Resp.

Moreover, the court is unaware of any legal authority for the proposition that Title VII or WLAD can be interpreted as creating a derivative right to maintain a claim for discrimination suffered by one's spouse. In general, a plaintiff must assert his own legal right rather than rest on the right of another. Wardin v. Seldin, 422 U.S. 490, 498 (1975). Even where a female co-worker is able to frame a cognizable Title VII claim, that does not

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<sup>12</sup>A claim of marital status discrimination exists, if at all, exclusively under state law. Title VII does not prohibit discrimination on the basis of marital status. Costa v. Desert Palace, Inc., 268 F.3d 882, 888 (9th Cir. 2001), aff'd in part, rev'd in part on other grounds, 299 F.3d 838 (9th Cir. 2002), aff'd 590 U.S. 90 (2003). The WLAD marital status protection makes it unlawful for an employer to discriminate because of "marital status." RCW § 49.60.180(3). "Marital status" is the legal status of being "married, single, separated, divorced, or widowed." RCW § 49.60.040(7).

1 allow male employees “to bootstrap their job grievances . . . into an employment  
 2 discrimination claim rooted in federal law.” Ruffin v. County of Los Angeles, 607 F.2d  
 3 1276, 1280-81 (9th Cir. 1979); see also Patee v. Pacific Northwest Bell Tel., 803 F.2d  
 4 476, 478 (9th Cir. 1986) (“The male workers do not claim that they have been  
 5 discriminated against because they are men. . . . [T]he male workers cannot assert the  
 6 right of their female co-workers to be free from discrimination based on their sex.”).

7 Absent a hint of evidence to suggest that Defendants subjected Mr. Cloer personally  
 8 to a hostile work environment, this claim does not withstand summary judgment.  
 9

#### 10 **F. Mr. Cloer’s Claim of Sex Discrimination**

11 Mr. Cloer alleges that he was demoted because of his sex. See Mr. Cloer Compl. ¶  
 12 10 (Dkt. # 1). In March 2002, Mr. Cloer was promoted to the position of Collective  
 13 Bargaining Representative. In April 2004, he was demoted to his former position, UFCW  
 14 Representative. The bases of Mr. Cloer’s claim appear to rest on his speculations that Ms.  
 15 Luty did not like men, that she was a lesbian, and that she was jealous of him because he  
 16 was a heterosexual male who dated attractive women. See Mr. Cloer Decl. at ¶ 15 (Dkt. #  
 17 91).  
 18

19 Mr. Cloer’s allegation borders on frivolity. To make out a prima facie case of sex  
 20 discrimination, Mr. Cloer must show that he (1) was within a protected class; (2) was  
 21 demoted; (3) was replaced by a person outside the protected group; and (4) was qualified  
 22 to do the job. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-02 (1973).  
 23 Heterosexual men who date attractive women are not a protected class under Title VII or  
 24 the WLAD.<sup>13</sup> To boot, UFCW’s unanswered evidence reveals that Mr. Cloer was replaced  
 25  
 26

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27  
 28 <sup>13</sup>Nor does the court find support for Mr. Cloer’s insistence that his personal fixation regarding  
 Ms. Luty’s sexuality is relevant to his employment discrimination claim.

1 by Edward Thomson, another heterosexual male. Luty Decl. ¶ 35 (R. at 290). The court  
2 therefore grants Defendants' motion on Mr. Cloer's sex discrimination claim.

### 3 **G. Claims of Retaliation**

4 Finally, Mr. and Ms. Cloer allege that they suffered retaliation in violation of Title  
5 VII and the WLAD. Title VII prohibits employers from discriminating against an  
6 employee because that employee "has opposed any practice made an unlawful  
7 employment practice by this subchapter, or because he has made a charge, testified,  
8 assisted, or participated in any manner in an investigation, proceeding, or hearing under  
9 this subchapter." 42 U.S.C. § 2000e-3(a).<sup>14</sup> To establish a prima facie case of retaliation,  
10 a plaintiff must show: (1) that she acted to protect her Title VII rights – often referred to as  
11 participation in a statutorily protected activity; (2) that an adverse employment action was  
12 therefore taken against her; and (3) that a causal link exists between the two events. Texas  
13 Dep't of Comm. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); see also Francom v.  
14 Costco Wholesale Corp., 991 P.2d 1182, 1191 (Wash. Ct. App. 2000) (setting forth same  
15 prima facie test for retaliation under WLAD). The burden of production then shifts to the  
16 defendant to present evidence of a "legitimate, non-retaliatory reason for the action it took  
17 against the plaintiff." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The  
18 ultimate burden lies with the plaintiff to show that the "defendant's proffered reason was a  
19 pretext and that illegal retaliation was a motivating reason for the defendant's decision."  
20 Id. at 804. A plaintiff's evidence must be both specific and substantial to overcome the  
21 legitimate reasons put forward by [the employer]." Aragon v. Republic Silver State  
22 Disposal, 292 F.3d 654, 659 (9th Cir. 2002).  
23  
24  
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26  
27 <sup>14</sup>Similarly, under the WLAD, "it is an unfair practice for any employer . . . to discharge, expel, or  
28 otherwise discriminate against any person because he or she has opposed any practices forbidden by this  
chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter."  
RCW § 49.60.210(1)

1 Mr. and Ms. Cloer produce a murky saga of allegedly retaliatory actions, none of  
2 which ultimately pass muster. See Pls.’ Resp. at 3-10; Ms. Cloer Dep., Ex. 4 (13-page  
3 EEOC Retaliation “Flow Chart”) (R 104-16).

4 **1. Mr. Cloer’s Claim of Retaliation**

5 In regard to participation in a statutorily protected activity, Mr. Cloer states that he  
6 “participated in [Ms. Cloer’s] and my own sexual discrimination charges and investigation  
7 and provided evidence of ongoing discrimination we both were experiencing.” Mr. Cloer  
8 Decl. at ¶ 12 (Dkt. # 91). He continues, “I complained to both Cynthia Bell and Geralyn  
9 Lutty about the sex discrimination against [Ms. Cloer] and myself about the continuing  
10 safety issues with Mr. Lago.” Id.

12 To resist summary judgment, Mr. Cloer “must set forth specific facts showing that  
13 there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). A “conclusory, self-serving  
14 affidavit, lacking detailed facts and any supporting evidence is insufficient to create a  
15 genuine issue of material fact.” FTC v. Publ’g Clearing House, 104 F.3d 1168, 1171  
16 (9th Cir. 1997). In addition, the court is “not required to comb the record to find some  
17 reason to deny summary judgment.” Forsberg v. Pacific N.W. Bell Tel. Co., 840 F.2d  
18 1409, 1418 (9th Cir. 1988).

20 Mr. Cloer fails to augment these generalized statements with identification of a  
21 specific complaint or protestation he made to his employer before he suffered alleged  
22 retaliation. Most critically, Mr. Cloer omits any detail as to how he participated in an  
23 investigation or provided evidence of discrimination. This omission exacts a fatal blow to  
24 his retaliation claim. Lacking more information, the court is not equipped to assess  
25 whether a causal connection exists between a protected activity and Mr. Cloer’s April  
26 2004 demotion or any other allegedly adverse employment action. For these reasons, the  
27 court concludes that Mr. Cloer fails to surmount even the first prong of the prima facie test  
28

1 for a retaliation claim.

2 **2. Ms. Cloer's Claim of Retaliation**

3 Ms. Cloer likewise fails to substantiate her claim of retaliation. Similar to Mr.  
4 Cloer's proffer, Ms. Cloer's evidence of statutorily protected activities is comprised of  
5 unspecific allegations concerning general concerns she voiced regarding her safety. See  
6 Pls.' Resp. at 5-8. Even so, according to evidence supplied by UFCW, Ms. Cloer arguably  
7 complained about what she perceived to be employment discrimination during her  
8 conversations with Ms. Luty in February and May 2003 and also through her July 28,  
9 2003 and September 22, 2003 letters to UFCW President, Mr. Dority. Although the court  
10 is willing to construe Ms. Cloer's complaints as arguably protected activities, she fails to  
11 produce sufficient evidence for a reasonable juror to conclude that UFCW engaged in  
12 retaliation.  
13

14 To survive summary judgment, Ms. Cloer must show that the allegedly retaliatory  
15 acts amounted to adverse employment action. An "adverse employment action" is  
16 something which "might have dissuaded a reasonable worker from making or supporting a  
17 charge of discrimination." Burlington N. & Santa Fe Ry. Co. v. White, \_\_ U.S. \_\_, 126 S.  
18 Ct. 2405, 2414-2415 (2006). While "petty slights or minor annoyances" are not actionable  
19 simply because an employee has reported discrimination . . . [t]he significance of any  
20 given act of retaliation will often depend on the circumstances," with its social impact  
21 "depending on a constellation of surrounding circumstances, expectations, and  
22 relationships which are not fully captured by a simple recitation of the words used or the  
23 physical acts performed." Id. at 2415. "[A]n act that would be immaterial in some  
24 situations is material in others." Id. at 2416.  
25

26 The allegedly adverse employment actions that Ms. Cloer identifies include: (1) a  
27 written admonishment in May 2003 following an investigation of a complaint raised by a  
28

1 co-worker under UFCW's anti-harassment policy; (2) an annual evaluation on February  
 2 11, 2004 wherein Ms. Luty gave Ms. Cloer the highest mark of "proficient" in twenty-  
 3 four categories, marks of "satisfactory" in seven categories, and "needs improvement" in  
 4 three categories; (3) Ms. Luty's February 2004 refusal to allow Ms. Cloer, while working  
 5 on a coordinated UFCW campaign, to stay at a different hotel from other UFCW  
 6 employees; (4) Ms. Luty's refusal to entirely remove Ms. Cloer's contact information  
 7 from the field employee contact sheet<sup>15</sup>; (5) the requirement that field employees without a  
 8 cell phone call in twice-a-day for messages; (6) the six-month practice of sending Ms.  
 9 Cloer certified mail in response to her complaint that she was not receiving mail; and (7) a  
 10 region-wide memorandum stating that employees were required to advise their supervisors  
 11 of work absences that was prompted by Ms. Cloer's unannounced absences. See Pls.'  
 12 Resp. at 5-8.<sup>16</sup>

14 The court finds that none of these incidents provides a sufficient evidentiary basis  
 15 from which a reasonable juror could find an adverse employment action. First, Ms.  
 16 Cloer's complaints comprise those trivial harms, ordinary tribulations, and minor  
 17 annoyances that are not actionable forms of retaliation. See Burlington, 126 S.Ct. at 2415.  
 18 For instance, the court cannot conceive of how UFCW's response to another employee's  
 19 formal complaint of workplace discrimination would dissuade a reasonable employee from  
 20 pursuing her own complaint. The Region 7 annual employee evaluation is a form of  
 21 employer feedback; it is not used for promotions, job assignments, or pay raises. Luty  
 22 Decl. ¶ 62 (R. at 299). Moreover, many of the allegedly adverse employment actions  
 23

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25  
 26 <sup>15</sup>As described above, UFCW allowed Mr. and Ms. Cloer to list a post office box on this sheet  
 instead of their home address in response to concerns regarding Mr. Lago.

27  
 28 <sup>16</sup>Ms. Cloer's proffer consists of generally muddled allegations lacking detail; the court relies in  
 part on uncontested evidence produced by Defendants. See Luty Decl. ¶¶ 12, 45-62, Exs. K, L, M (R. at  
 284, 293-99, 322-25); Ms. Cloer Dep., Ex. 15 (R. at 117-118).

1 appear to constitute uniform UFCW policies. Ms. Cloer took issue with these policies in  
2 her attempt to protect herself from a seemingly persistent and threatening ex-boyfriend.  
3 As the court previously noted in the context of its sexual harassment analysis, UFCW's  
4 responses to her requests were reasonable remedial measures. Ms. Cloer may justifiably  
5 feel frustrated with UFCW's inability to abide by each and every one of her requests, but a  
6 failure to remedy a particular grievance is not necessarily an adverse employment action.

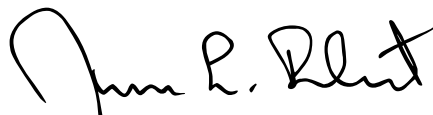
7 Finally, Ms. Cloer fails to produce a genuine issue of material fact concerning  
8 whether UFCW's reasons for its actions or policies were a pretext for retaliation. UFCW  
9 offers legitimate business reasons for requiring that field employees stay in the same hotel,  
10 maintaining a field employee contact sheet, ensuring that employees receive their mail,  
11 requiring field employees to periodically call in, and requiring employees to advise their  
12 supervisors of anticipated absences. See Luty Decl. ¶¶ 45-62 (R. at 293-99). Ms. Cloer  
13 fails to answer these explanations with evidence of pretext.  
14

15 The court therefore grants Defendants' motion for summary judgment on Ms.  
16 Cloer's claim of retaliation.  
17

#### 18 IV. CONCLUSION

19 The court GRANTS Defendants UFCW, Geralyn Luty, and Cynthia Bell's motion  
20 for summary judgment (Dkt. # 34). This order disposes of all pending claims in this  
21 matter. The court directs the clerk to enter judgment consistent with this order.

22 Dated this 22nd day of February, 2007.  
23

24  
25   
26 JAMES L. ROBART  
27 United States District Judge  
28